A

SOUTHERN ACIDS (M) BHD

v.

STANDARD CHARTERED BANK MALAYSIA BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[SUIT NO: D-22NCC-658-2010]
3 MARCH 2011

C

CIVIL PROCEDURE: *Stay of action - Forum non conveniens - Parties agreed to English law as governing law of master agreement under which transactions were in dispute - Plaintiff alleging transactions were wagering contracts and void under s. 31 Contracts Act 1950 and s. 26 Civil Law Act 1956 and in breach of relevant notice issued under*

D

Exchange Control Act 1953 - Whether English Court proper forum to hear plaintiff's action

E

The plaintiff entered into the ISDA Master Agreement with the defendant which was a standardised international contract for parties to enter into derivatives transactions. By cl. 1(c) of the Master Agreement, all transactions entered into under the Master Agreement constituted a single agreement between the parties and by cl. 13 thereof, there was a provision for a "non-exclusive jurisdiction clause" which named the English Courts as the intended place of jurisdiction. Pursuant to the Master Agreement, the plaintiff entered into three transactions with the defendant. The plaintiff subsequently gave written notice to the defendant alleging that the three transactions were wagering contracts and as such were void and of no effect. The plaintiff then filed a suit against the defendant for the following prayers (1) a declaration that the transactions were wagering contracts and therefore void under s. 31 of the Contracts Act 1950 ('CA') and s. 26 of the Civil Law Act 1956 ('CLA') (2) a declaration that the transactions were illegal and/or tainted with illegality and therefore void in breach of the Exchange Control Malaysia Notice No 2 ('ECM 2') issued under the Exchange Control Act 1953 ('ECA') and (3) an order that the defendant pay damages to the plaintiff in the sum of RM40,486,602.11 or such lesser sum as determined by the court less the sum of RM1,389,088.96 paid by the defendant to the plaintiff as the purported Close Out Amount, Unpaid Amounts, interests and the Early Termination Amount under the three transactions.

F

G

H

I

In this instance, the defendant filed a summons-in-chambers to stay the proceedings on the ground that the plaintiff's suit should be heard in the English Courts being the *forum conveniens* based on cl. 13 of the Master Agreement.

Held (allowing the application for stay with costs of RM10,000 on the grounds that the English Court was the proper forum to hear plaintiff's suit):

(1) The question of whether the three transactions were wagering contracts and therefore void was a question of law. This issue was clearly governed by English law in view of the non-exclusive jurisdiction clause under the Master Agreement. (para 14)

(2) The parties had submitted to the English jurisdiction and the plaintiff had waived any objection that England was an inconvenient forum. As such, the burden was on the plaintiff to show why the trial should proceed in Malaysia and not in England. However, the plaintiff failed to discharge the burden by showing any special or exceptional reasons to justify its commencement of the action in Malaysia in disregard of the non-exclusive jurisdiction clause. (para 14)

(3) If the proceedings were to continue in Malaysia and given that the law governing the Master Agreement was English law, expert evidence would be required to be adduced as to what constituted gaming and wagering contracts and in particular as to whether derivatives transactions amounted to gaming or wagering transactions under the English law. (para 14)

(4) It was a fundamental principle in the conflict of laws that where the parties had selected a proper law of the contract then that law would govern the contract. In the present case, the parties had chosen English law to be the proper law of the contract and thus, English law should govern all aspects of the contract. (para 14)

(5) There was no likelihood of major disputes of facts and as such, there would not be a need to call many witnesses. The related costs in securing the attendance of witnesses would be reasonably low. As for the availability of documents, the issue would be similar whether the case was heard in Malaysia or in England. If the case was to be heard in Malaysia, the

defendant would be put to considerable expense and inconvenience in calling expert witnesses on English gaming and wagering contract law to prove its case. Further, the Malaysian court could not take judicial notice of English law. It had to be proven as a matter of fact through expert witnesses on the law under the provisions of s. 45 of the Evidence Act 1950. (para 16)

(6) Notwithstanding that the alleged illegality of the three transactions contravened Malaysian law, *ie*, s. 31 CA and s. 26 CLA, the issue should be determined by English law being the governing law of the Master Agreement and the transactions. The transactions allegedly contravening the ECM 2 was the lesser issue as compared to the alleged illegality of gaming and wagering transactions which was the dominant issue. Therefore, the determination of the dominant issue should take precedence in the English Court. (para 16)

(7) There would be no prejudice caused to the plaintiff by bringing this action in England as there was nothing to suggest that the plaintiff would not be able to enforce the judgment should they succeed or face any time bar in England. Significantly, there was no evidence to suggest that the plaintiff would not be able to get a fair trial in England. (para 16)

(8) The plaintiff would have considered the cost factor before agreeing to the primary place of jurisdiction and could not now be heard to complain that a trial in England would be expensive. If the case was heard in England, the parties would not need to call expert witnesses to prove the content of English law and that would reduce the number of witnesses to be called, the length of trial and the costs to be incurred accordingly. On the other hand, the defendant would be put to considerable expense and inconvenience in calling expert witnesses on English gaming and wagering contract law to prove its case if the case was heard in Malaysia. (para 16)

[No order made on alternative prayers 2 and 3 in light of ruling made on prayer 1 of summons-in-chambers.]

Case(s) referred to:
Baiduri Bank Bhd v. Dong Sui Hung & Anor [2000] 4 SLR 212 ***(refd)***
Bambang Sutrisno v. Bali International Finance Ltd & Ors [1999] 3 SLR 140 ***(refd)***
HIT Entertainment Ltd v. Gaffney International Licensing Pty Ltd [2007] EWHC 1282 ***(refd)***
Inter Maritime Management Sdn Bhd v. Kai Tai Timber Co Ltd, Hong Kong [1995] 4 CLJ 164 CA ***(refd)***
JP Morgan Securities Asia Private Ltd v. Malaysian Newsprint Industries Sdn Bhd [2001] 2 Lloyd's Rep 41 ***(refd)***
Noble Power Investments Ltd & Anor v. Nissei Stomach Tokyo Co Ltd [2008] HKCU 1009 ***(refd)***
S & W Berisford Plc v. New Hampshire Insurance Co [1990] 1 Lloyd's Rep 454 ***(refd)***
Spiliada Maritime Corporation v. Cansulex Ltd [1987] 1 AC 460 ***(refd)***
The Eleftheria [1970] P 94 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 26
Contracts Act 1950, s. 31
Courts of Judicature Act 1964, s. 23(1)
Evidence Act 1950, s. 45
Rules of the High Court 1980, O. 12 r. 7

Other source(s) referred to:
Dicey & Morris, *The Conflict of Laws,* 11th edn, p 1161

For the plaintiff - Yeoh Cho Kheong; M/s Ranjit Singh & Yeoh
For the defendant - Rabindra S Nathan (Allister Tan with him); M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Mah Weng Kwai JC:

[1] On 14 May 2004 the plaintiff entered into an agreement known as the master agreement (the master agreement), published by the International Swaps and Derivatives Association (ISDA) with the defendant.

[2] The master agreement is a standard form of agreement prepared under the auspices of ISDA which is widely used in the banking industry in documenting derivatives transactions between banks, financial institutions and their counterparts.

[3] The schedule to the master agreement contains the agreed specific contractual requirements of the plaintiff and defendant.

[4] Prior to entering into the master agreement the plaintiff had represented to the defendant that:

(a) it exported its products overseas;

(b) its export proceeds were in foreign currency, mainly in US dollars;

(c) it was familiar with the foreign currency market; and

(d) it was necessary for it to hedge its exposures to movements in such foreign currencies.

[5] It was agreed between the parties that the governing law of the master agreement and the various transactions thereunder (the confirmation), is English law.

[6] Pursuant to the master agreement, the plaintiff entered into three transactions known as the Target Redemption Forward Currency (TRFC)/foreign exchange transactions on 6 May 2008, 29 May 2008 and 23 July 2008 with the defendant (the three transactions).

[7] By cl. 1(c) of the master agreement all transactions entered into under the master agreement and all confirmations thereunder shall constitute a single agreement between the parties.

[8] On 5 May 2010 the plaintiff gave written notice to the defendant that it was of the view that the three transactions were wagering contracts and as such were void and of no effect.

[9] Thereafter on 26 July 2010 the plaintiff filed a suit against the defendant for the following reliefs:

(a) a declaration that the three transactions are wagering contracts and therefore void under s. 31 of the Contracts Act 1950 (CA) and s. 26 of the Civil Law Act 1956 (CLA),

(b) a declaration that the three transactions are illegal and/or tainted with illegality and therefore void being in breach of the Exchange Control Malaysia Notice No 2 issued under the Exchange Control Act 1953 (ECA) and

(c) an order that the defendant pay damages to the plaintiff in the sum of RM40,486,602.11 or such lesser sum as determined by the court less the sum of RM1,389,088.96 paid by the defendant to the plaintiff as "the purported close out amount, unpaid amounts, interests and the early termination amount under the three transactions".

[10] Upon being served with the amended writ of summons and statement of claim, the defendant filed a summons in chambers (encl. 7) pursuant to O. 12 r. 7 Rules of the High Court 1980 to stay the proceedings on the ground that the plaintiff is bound by the jurisdiction clause contained in cl. 13(b)(i)(l)(A) of the master agreement and as such the suit ought to have been filed in the English courts being the *forum conveniens*.

Grounds Of The Defendant's Stay Application

[11] The defendant's application is premised on the following grounds:

(a) that the parties have agreed contractually in cl. 13(b)(i)(l)(A) of the master agreement that the master agreement and the confirmations are governed by English law;

(b) although the jurisdiction clause in the master agreement is non-exclusive, the conferment of jurisdiction on the English courts constitutes an identification of the English courts as the primary place of jurisdiction;

(c) that the plaintiff has in the master agreement waived any objection to the jurisdiction of the English courts;

(d) that the English courts have jurisdiction and would be the more proper and appropriate forum to determine the validity and/or legality of the master agreement and the three transactions;

(e) that expert witnesses on English law on *inter alia*, wagering contracts and foreign exchange transactions would be needed to aid a Malaysian court to decide on the issues of law;

(f) that the Malaysian Exchange Control legislation (the Exchange Control Notices and Guidelines issued by the controller of Foreign Exchange, Malaysia) does not invalidate the three transactions;

A (g) the defendant being a licensed on shore bank, is permitted by law to enter into TRFC/foreign exchange transactions (such as the three transactions) provided that the counter party is a Malaysian resident and that it had entered into the said transactions for hedging purposes;

B (h) that the defendant had entered into four other TRFC transactions prior to the three transactions but the plaintiff has not taken any action to declare them void and/or illegal; and

C (i) that the Malaysian High Court is not the *forum conveniens* and that the *forum conveniens* for this case should be the English High Court.

The Plaintiff's Response

D **[12]** In opposing the defendant's application, the plaintiff relied on the following grounds:

(a) that the Malaysian High Court has the jurisdiction to try this matter by virtue of s. 23(1) of the Courts of Judicature Act E 1964 (CJA) notwithstanding the existence of cl. 13 of the master agreement;

(b) that the non-exclusive jurisdiction clause in the master agreement does not preclude the plaintiff from instituting F proceedings in other jurisdictions. The plaintiff relied on the Hong Kong case of *Noble Power Investments Ltd & Anor v. Nissei Stomach Tokyo Co Ltd* [2008] HKCU 1009 and the Singapore case of *Baiduri Bank Bhd v. Dong Sui Hung & Anor* [2000] 4 SLR 212 in support;

G (c) that the parties have in fact agreed to submit to the jurisdiction of the courts of any other forum;

(d) that the plaintiff is not in breach of any agreement by initiating H legal proceedings in Malaysia that is, in a jurisdiction other than in the English courts;

(e) that pursuant to the illustration contained in para. 33(2) of the decision of Ma CJ in the case of *Noble Power Investments Ltd & Anor (supra)*, on a true construction of cl. 13, "the I parties have agreed to submit to the jurisdiction of the courts of any other forum or jurisdiction so long as it is permitted by applicable law";

(f) that the burden which is a heavy one, is on the defendant to show that the English High Court is the more appropriate forum in this case. The burden is not on the plaintiff to prove exceptional circumstances;

(g) that the usual factors in support of a stay application based on forum non conveniens such as inconvenience of witnesses, location of documents or timing of the trial are irrelevant;

(h) that the defendant in its submission failed to consider the effect of cl. 13 in its interpretation of a non-exclusive jurisdiction clause; and

(i) that, notwithstanding para. 12(g) above, the plaintiff can show exceptional circumstances in support of its contention that the Malaysian court is the more appropriate forum:

(i) generally, each contract is to be governed by the law of the country in which it is made ie, the *lex loci contractus*;

(ii) the *lex fori* in this case will be Malaysian law being the law of the forum of the court;

(iii) Malaysian law will not enforce a contract which is tainted with illegality. A foreign law such as English law on this point of law will be irrelevant;

(iv) the plaintiff's cause of action and reliefs sought go to the root of the question of validity of the 3 Transactions,

(v) the plaintiff and defendant are companies incorporated in Malaysia under Malaysian law;

(vi) the Master Agreement and the 3 Transactions were entered into and performed in Malaysia;

(vii) the potential witnesses and documents for trial are located in Malaysia;

(viii) the alleged breaches/illegal acts were committed in Kuala Lumpur, Malaysia;

(ix) the issues to be decided are governed by Malaysian law; and

(x) there will be a saving of time and costs if the matter is heard in the Malaysian High Court.

A **Decision Of The Court**

[13] Upon reading the cause papers and the written submissions and upon hearing the oral submissions of counsel for the defendant and plaintiff, the court allowed the defendant's B application for a stay in terms of prayer 1 of encl. 7, concluding effectively that the English High Court is the more appropriate forum, together with costs of RM10,000. No order was made in respect of prayers 2 and 3.

C **Reasons For The Decision**

[14] After a careful consideration of the various propositions of law and arguments submitted by counsel in support, the court made the following observations and findings:

D (a) The master agreement provided the overall terms and conditions under which the derivatives transactions were entered into between the plaintiff and defendant. The transactions are each separately evidenced by a 'confirmation' and by cl. 1(c) of the master agreement, all transactions E entered into thereunder collectively constitute one single agreement.

(b) The three transactions are the subject matter of this case. In each transaction the plaintiff purchased Ringgit Malaysia (RM) from the defendant using US Dollars (USD) at a forward/ F future rate as the plaintiff had earned substantial USD from its export sales.

(c) In the 1st transaction, the plaintiff purchased RM from the defendant at the forward/future rate of RM3.25/USD for a G period of 23 months (from 20 May 1988 to 20 April 2010). In the 2nd transaction, the plaintiff purchased RM from the defendant at the forward/future rate of RM3.35/USD for a period of 18 months (from June 2008 to December 2009) and in the 3rd transaction, the plaintiff purchased RM from the H defendant at the forward/future rate of RM3.33/USD for a period of 15 months (August 2008 to November 2009).

(d) The plaintiff's claim is founded on two causes of action namely, i) that the three transactions are in fact and in law I wagering contracts and therefore void under s. 31 CA and s. 26 CLA and ii) that the three transactions are in breach of the ECA.

(e) The plaintiff filed the suit in the Kuala Lumpur High Court to recover damages against the defendant on the premise that Malaysian law governs the two causes of action and that the Malaysian High Court is the proper forum.

(f) The defendant on the other hand contended that the wagering issue is not governed by Malaysian law but by English law as the parties had contractually agreed and selected English law to be the law governing the master agreement and that the English High Court is the appropriate forum. The defendant conceded that the exchange control issue is governed by Malaysian law.

(g) In the master agreement by cl. 13, there is provision for a "non-exclusive jurisdiction clause" which names the English courts as the intended place of jurisdiction.

(h) The defendant's stay application is based on this non-exclusive jurisdiction clause.

(i) Clause 13 of the master agreement provides as follows:

13. Governing Law and Jurisdiction

(a) Governing Law. This Agreement will be governed by and construed in accordance with the law specified in the Schedule.

(b) Jurisdiction. With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement ("Proceedings"), each party irrevocably:

(i) submits:

(1) if this Agreement is expressed to be governed by English Law, to (A) the non-exclusive jurisdiction of the English Courts if the Proceedings do not involve a Convention Court and (B) the exclusive jurisdiction of the English Courts if the Proceedings do involve a Convention Court; or

(2) if this Agreement is expressed to be governed by the laws of the State of New York, to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City;

(ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party; and

(iii) agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions will not preclude the bringing of Proceedings in any other jurisdiction.

And the schedule at part 4(h) provides:

> This Agreement will be governed by and construed in accordance with the laws of England.

(j) It is important to note the critical elements in the non-exclusive jurisdiction clause namely:

(i) the parties had voluntarily and contractually agreed to have England as the intended place of jurisdiction and to submit to the jurisdiction of the English Courts,

(ii) the parties had selected English law to be the governing law for the Master Agreement,

(iii) the parties had agreed to waive any objection that the English Court is an inconvenient forum,

(iv) the parties must be deemed to have accepted the location of witnesses and documents, the country of residence of the plaintiff and defendant, the cost and inconvenience of selecting England as the intended place of jurisdiction, not to be of major relevance and significance, and

(v) the parties have foreseen the various factors and hence had taken them into account when agreeing on the English Courts as the forum of choice.

(k) Of the two causes of action, the main cause is the wagering issue and not the exchange control issue.

(l) The question of whether the three transactions are wagering contracts and therefore void is a question of law. In view of the non-exclusive jurisdiction clause under the master

agreement, this issue is clearly governed by English law. The Exchange Control issue although governed by Malaysian law is a smaller and less significant issue than the wagering issue.

(m) Essentially, there is no substantive dispute of fact in the wagering and exchange control issues which will require the presence of numerous witnesses to testify in the English courts.

(n) The court held taking a wholistic approach, that the more appropriate forum for the trial of the action would be the English High Court and not the Malaysian High Court because:

(i) of the existence, interpretation and effect of the non exclusive jurisdiction clause in the Master Agreement;

(ii) the parties had submitted to English jurisdiction;

(iii) the plaintiff has waived any objection that England is an inconvenient forum;

(iv) the burden is on the plaintiff to show why the trial should proceed in Malaysia and not in England. In the Court of Appeal case of *Inter Maritime Management Sdn Bhd v. Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322, Gopal Sri Ram JCA (as he then was) held that the burden was on the respondent to produce strong grounds to displace the forum that had been selected;

(v) the plaintiff has failed to discharge the burden by showing any special or exceptional reasons to justify its commencement of the action in Malaysia in disregard of the non-exclusive jurisdiction clause; and

(vi) if the proceedings were to continue in Malaysia and given that the law governing the Master Agreement is English law, expert evidence will be required to be adduced as to what constitutes gaming and wagering contracts and in particular as to whether derivatives transactions amount to gaming or wagering transactions under English law.

(o) The principal purpose of the non-exclusive jurisdiction clause is to determine the primary place of jurisdiction. By cl. 13, the parties had selected England to be the primary place of jurisdiction. The plaintiff by filing the suit in Malaysia had wantonly disregarded the non-exclusive jurisdiction clause. The burden is on the plaintiff to show why the suit should proceed in Malaysia since the parties had agreed to submit to the jurisdiction of the English courts. The agreement creates a strong *prima facie* case that the English jurisdiction is the appropriate forum.

(p) In the House of Lords case of *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] 1 AC 460 Lord Goff held that "the basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(q) In the case of *S & W Berisford Plc v. New Hampshire Insurance Co* [1990] 1 Lloyd's Rep 454 Hobhouse J held:

> ... The fact that the parties have agreed in their contract that the English Court shall have jurisdiction (*albeit* non-exclusive jurisdiction) creates a strong *prima facie* case that the jurisdiction is an appropriate one; it should in principle be a jurisdiction to which neither party to the contract can object as inappropriate; they have both implicitly agreed that it is appropriate.

The S & W Bersisford Plc case was cited with approach in the case of *JP Morgan Securities Asia Private Ltd v. Malaysian Newsprint Industries Sdn Bhd* [2001] 2 Lloyd's Rep 41.

(r) The same approach was adopted by the Singapore Court of Appeal in *Bambang Sutrisno v. Bali International Finance Ltd & Ors* [1999] 3 SLR 140 and in the case of *HIT Entertainment Ltd v. Gaffney International Licensing Pty Ltd* [2007] EWHC 1282.

(s) It is a fundamental principle in the conflict of laws that where the parties have selected a proper law of the contract then that law will govern the contract. In the present case, the parties had chosen English law to be the proper law of the

contract and thus English law should govern all aspects of the contract. In *The Conflict of Laws*, 11th edn by Dicey & Morris at p. 1161 the term "proper law of a contract" has been stated to mean the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection".

[15] The plaintiff has failed to explain and/or give sufficient reasons as to why the non-exclusive jurisdiction clause should not apply to prevent the suit from being litigated in England.

[16] The defendant has shown that England is the more appropriate forum.

(a) In the event the court has erred in law in holding that the non-exclusive jurisdiction clause has created a strong *prima facie* case that the jurisdiction of the English courts is the appropriate one, the court is of the view that the defendant has ably discharged its legal burden of proof to show that the English court is clearly the more appropriate forum to hear the present case for the following reasons:

(b) As discussed earlier, the governing law of the master agreement and the three transactions is English law. It is not open now to the plaintiff to argue that England is an inconvenient forum. The plaintiff will be precluded from raising the grounds that the contract was entered into and performed in Malaysia, the residence and convenience of the witnesses, the location of documents, the timing of a trial and other similar matters.

(c) In the English High Court case of *The Eleftheria* [1970] P 94 Brandon J (as he then was) held that "in general and all other things being equal, it is far more satisfactory for issues concerning the law of a foreign country to be decided by courts of that country."

(d) The relevant issues to be considered by a court when hearing an application for a stay of proceedings such as in this case have been laid down in *The Eleftheria*. The issues are:

(i) Location of witnesses and availability of documents:

The main cause of action in the suit is the alleged illegality of the 3 Transactions, which is a question of law. The question is to be determined by English law which is the governing law of the transactions.

It is unlikely that there will be major disputes of facts and as such, there will be no need to call many witnesses. The related costs in securing the attendance of witnesses will be reasonably low. As for the availability of documents the issue will be similar whether the case is heard in Malaysia or in England.

If the case is to be heard in Malaysia, the Defendant on the other hand, will be put to considerable expense and inconvenience in calling expert witnesses on English gaming and wagering contract law to prove its case.

On a balance, it will be more convenient for the parties to have the case heard in the English Courts.

(ii) The governing law of the Master Agreement:

Pursuant to cl. 13(a) of the Master Agreement, the parties have contractually agreed that the governing law of the Master Agreement is English law. The plaintiff does not dispute this.

If the case is heard in Malaysia, the Court cannot take judicial notice of English law. It has to be proven as a matter of fact through expert witnesses on the law under the provisions of s. 45 of the Evidence Act 1950. As stated earlier, the calling of expert witnesses on English law in the Malaysian High Court will be costly and time consuming.

Following the principles laid down in The Eleftheria the Court is of the view that English law is best left to be determined by the English Courts.

The plaintiff alleges that the 3 Transactions are illegal as they contravene s. 31 CA and s. 26 CLA. The plaintiff contends that it is Malaysian law that is applicable to determine the scope and validity of the Master Agreement.

However, the court is of the view that as the governing law is English law, it should be English law that will determine the question of the alleged illegality of the 3 Transactions.

The plaintiff also contends that the 3 Transactions contravene the Exchange Control Malaysia Notice No. 2, effective 1/9/98 (ECM 2) issued pursuant to the ECA and are therefore void for illegality as well.

While agreeing with counsel for the defendant that the determination of the alleged contravention of ECM 2 may be better dealt with by a Malaysian Court as being the more appropriate forum, the court is however of the view that from the stated facts of the case the alleged breach of ECM 2 is a lesser issue and the determination of the dominant issue of the alleged illegality of gaming and wagering transactions should take precedence in the English Court.

(iii) Whether the defendant is seeking to obtain any advantage in having the case heard in England:

Suffice to say that there has been no allegation made by the plaintiff that the defendant is seeking to steal a march on the plaintiff by having the case heard in England.

(iv) Whether the plaintiff will be prejudiced by bringing this action in England:

There will be no prejudice caused to the plaintiff by bringing this action in England. There is nothing to suggest that the plaintiff will not be able to enforce the judgment should they succeed or face any time bar in England. Importantly, there is no evidence to suggest that the plaintiff will not be able to get a fair trial in England.

(v) The cost factor:

The plaintiff having agreed to the non-exclusive jurisdiction clause under the Master Agreement that the primary place of jurisdiction shall be England, the plaintiff cannot now be heard to complain that a trial in England will be expensive. The plaintiff agreed to the primary place of jurisdiction

being England willingly and without any undue influence or pressure. The plaintiff would have considered the cost factor before agreeing to the primary place of jurisdiction.

If the case is heard in England, the parties will not need to call expert witnesses to prove the content of English law. This will reduce the number of witnesses to be called, the length of trial and the costs to be incurred accordingly.

[17] In exercising its discretion to grant the order for a stay of proceedings, the court has taken into account all the circumstances pertaining to this case. Where the defendant has applied for a stay of proceedings based on the non exclusive jurisdiction clause, the court is not bound to refuse a stay but has a discretion whether to refuse a stay or not. The court in exercising its discretion has given effect to the agreement between the parties.

[18] In light of the ruling of the court on prayer 1 of the summons in chambers, the court did not proceed to consider the alternative prayer 2 of the defendant based on *forum non conveniens*. Accordingly no order was made on prayer 2.